No. 09-908

In The
Supreme Court of the United States

DEBORAH ORLANDO COONEY,

Petitioner,

v.

LYLE ROSSITER, JR., M.D., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT, LYLE ROSSITER, JR., M.D.

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QUESTION PRESENTED

Whether, because of well-established and long-standing common law principles, court-appointed special masters, such as custodial evaluators and guardians ad litem, who are performing judicial functions, should continue to have absolute immunity from civil liability under 42 U.S.C. § 1983, for acts done within the scope of their judicial appointments.

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STATEMENT OF THE CASE

The suit arises out of a family law matter originally filed in the Circuit Court for the 17th Judicial Circuit, Winnebago County, Illinois. The state court proceeding was a protracted divorce and custody battle which ultimately terminated with custody of Petitioner's children being awarded to their father. During the pendency of the custody proceedings, the state court trial judge appointed an attorney to act as representative (guardian ad litem) for the minor children, Respondent, Kathryn Bischoff, and a forensic psychiatrist to act as a custodial evaluator, Respondent, Lyle Rossiter, Jr., M.D.

Ultimately, the state court trial judge based his custody determination on the conclusions and recommendations of Respondent Rossiter. Specifically, Rossiter opined that Petitioner suffered from Munchausen syndrome by proxy,[1] which she manifested through physical and emotional abuse of her son, primarily by seeking to have him diagnosed with various, serious physical and psychological maladies. Respondent Rossiter also recommended that the

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[1] "Munchausen syndrome by proxy," also referred to as "factitious disorder by proxy" is a form of maltreatment wherein the perpetrator (usually a mother) deliberately induces or exaggerates a physical or psychological problem in the victim (usually a child) for personal gratification. *See, e.g., In re Guardianship of Rebecca B., et al.*, 260 Neb. 922, 926 (2000); *Roska ex rel. v. Peterson*, 328 F.3d 1230, 1238 (10th Cir. 2003); *Adoption of Keefe*, 49 Mass. App. Ct. 818, 819 (2000).

children be placed in the sole and immediate custody of their father.

Petitioner next filed a *pro se* suit in the district court[2] pursuant to 42 U.S.C. § 1983, alleging that the state court judge was at the center of a conspiracy of officers of the court intended to wrongfully deprive her of the custody of her children. The parties to the original suit included the judge, the Winnebago County State's Attorney, her putative spouse's attorney, her children's therapist, the Illinois Department of Children and Family Services, and Respondents in this matter. All defendants filed motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and/or 12(b)(6). Respondents Rossiter and Bischoff both raised absolute immunity in their respective motions to dismiss.

In their motions to dismiss, both Respondents asserted that long-standing precedent established that experts and guardians ad litem (child representatives) appointed by the court were absolutely immune from civil liability for those acts done within the course of their appointments. Recognizing existing precedent, as to Respondent Bischoff, the court

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[2] She has also filed suit against Respondent Rossiter alleging intentional infliction of emotional distress, a tort recognized under the common law of Illinois, in the Circuit Court for Cook County, case no. 07 L 6089. There is a motion to dismiss pending in that court which also argues absolute immunity. The circuit court has indicated that the motion should be granted but held a final decision in abeyance pending final resolution of this federal matter.

wrote: "Indeed, the Seventh Circuit and courts in our district have agreed, holding that 'absent absolute immunity, the specter of litigation would hang over a [guardian ad litem's] head, thereby inhibiting a GAL in performing duties essential to the welfare of the child whom the GAL represents.'" *Cooney v. Rossiter,* No. 07 C 2747, 2008 WL 3889945, at *7, *8 (N.D.Ill. Aug. 20, 2008) (citations omitted). Again, relying on well-established principles, the district court addressed Respondent Rossiter's immunity: "As the Seventh Circuit aptly commented, 'a nonjudicial officer who is delegated judicial duties in aid of the court should not be a lightning rod for harassing litigation aimed at the court.' *Dellenbach v. Letsinger,* 889 F.2d 755, 763 (7th Cir. 1989) (internal quotation omitted)." *Cooney*, 2008 WL 3889945, at *8.

Similarly, the appellate court below relied upon precedent.

> Rossiter and Bischoff are entitled to absolute immunity. Guardians ad litem and court-appointed experts, including psychiatrists, are absolutely immune from liability for damages when they act at the court's direction. *E.g., Jones v. Brennan,* 465 F.3d 304, 308 (7th Cir. 2006) (Illinois law); *Scheib v. Grant,* 22 F.3d 149, 157 (7th Cir. 1994) (same); *Hughes v. Long,* 242 F.3d 121, 127-28 (3d Cir. 2001); *Kurzawa v. Mueller,* 732 F.2d 1456, 1458 (6th Cir. 1984).

Cooney v. Rossiter, 583 F.3d 967, 970 (7th Cir. 2009).

Contrary to the assertion in Petitioner's petition that the district court did not properly consider the factual allegations of her complaint, both the district court and the appellate court below reviewed and considered those allegations in their respective decisions. Petitioner has "not alleged any facts or offered any legal authority demonstrating that absolute immunity should not apply in this particular case." *Cooney*, 2008 WL 3889945, at *8.

Even more telling:

> Although Cooney charges that Rossiter and Bischoff were part of an illegal conspiracy to deprive her of custody of the children, they are entitled to absolute immunity because the specific acts (actual or alleged) of which she complains, such as that Bischoff and Rossiter communicated with each other about their perceptions of Cooney and the children, that the conclusions in Rossiter's report are false, and that Bischoff may have given a draft copy of the report to [the husband's attorney] but not to Cooney, all occurred within the course of their court-appointed duties. *Cooney does not allege that Rossiter or Bischoff engaged in misconduct outside that course.*

Cooney, 583 F.3d at 970 (emphasis added, citation omitted).

It is from the holding of the Court of Appeals that Respondents are absolutely immune from civil liability pursuant to section 1983, for alleged misconduct done *within the course of their court-appointed duties*, that Petitioner seeks review.

REASONS FOR DENYING THE PETITION

Petitioner has presented no "compelling reason" why this Court should grant her petition for *writ of certiorari*. *See* Sup. Ct. R. 10. Specifically, Petitioner has failed to demonstrate that there is any conflict with any opinion of this Court and the decision of the U.S. Court of Appeals, below, or between any decisions of the circuits of the Court of Appeals.

Petitioner's argument is essentially twofold. First, that precedent is inapposite because guardians ad litem and court-appointed experts are not recognized as absolutely immune in the common law. Second, that there is a split of authority among the circuits of the Court of Appeals on the applicability of absolute immunity to Respondents. In support of these arguments, Petitioner misstates or misconstrues decisions of both this Court and the Court of Appeals. Respondents file these objections to bring those misstatements to the attention of this Court and urge that the petition for *writ of certiorari* to the Seventh Circuit be denied.

I. Absolute Immunity Under 42 U.S.C. § 1983.

Relying most heavily on a dissent to this Court's denial of a petition for *writ of certiorari* in prior pronouncement in *Hoffman v. Harris,* 511 U.S. 1060 (1994) (Thomas, J., dissenting), Petitioner urges that absolute immunity in an action brought pursuant to section 1983 may only be extended to those court-appointed officials extant in 1871, when section 1983 became law. Petitioner looks to the point made in the dissent, that a state actor seeking absolute immunity under section 1983 against liability must show that a counterpart privilege was recognized in common law in 1871. *Hoffman*, 511 U.S. at 1060 (citing *Burns v. Reed,* 500 U.S. 478, 498 (1991) (Scalia, J., concurring in judgment in part and dissenting in part)). Petitioner's reliance on this non-precedential remark of the Court is misplaced.

To begin, *Hoffman* involved a question related to quasi-prosecutorial functions where two social workers had *instituted* court proceedings. *Id.* at 1631. Contrasting, in this case, neither of Respondents' court-appointed roles was quasi-prosecutorial. Rather, Respondents here were acting as aids to the judge in determining the best interest of the minor children for purposes of carrying out the judicial function of determining custody. *See* 750 ILCS 5/601, *et seq.* In this light, the question is more properly framed as whether there were counterpart privileges for Respondents which were recognized in 1871. This question is unequivocally answered in the affirmative.

For Petitioner to suggest, as she does, that neither the district court or appellate court below considered whether absolute immunity existed for guardians ad litem and court-appointed experts in 1871 is patently absurd. Both of the lower courts looked to and relied upon existing authority extending absolute immunity to court-appointed officials such as Respondents in granting the motions to dismiss. More importantly, this Court has extended immunity to state actors functioning in a judicial capacity such as that of Respondents.

The law of privilege from suit under section 1983 does not arise from the statute but is largely one of judicial making. *Butz v. Economou*, 438 U.S. 478, 501-02 (1978). Despite the lack of explicit direction in section 1983, this Court has nonetheless "ascertained and announced" appropriate immunities from civil liability under section 1983 in various contexts. *Id.* at 502. In *Butz*, the Court discussed the "cluster of immunities protecting the participants in judge-supervised trials" and concluded that "absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation." *Id.* at 512. Petitioner fails to see the irony in her brief in support. This Court's reasoning behind its holding in *Butz* was the potential that "the loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus." *Id.* (citing *Pierson v. Ray*, 386 U.S. 547, 554 (1967)).

It may not be argued, either, that the absolute immunity discussed in *Butz*, does not flow from the common law immunities existing in 1871. In *Pierson,* this Court held that judges and those involved in the judicial process were absolutely immune from suits brought pursuant to section 1983. 386 U.S. at 554. The Court specifically discussed the fact that those acting in a judicial role had been granted absolute immunity from suit at common law since long before the passage of the Civil Rights Act of 1871. *Id.* at 554 n.9.

Petitioner suggests that it is error for the courts below to have applied and extended the broad concept of immunity for acts done in the scope of judicial proceedings to specific court-appointed judicial officers. Instead, without support of authority, she asserts that because guardians ad litem and court-appointed experts did not exist in 1871, absolute judicial immunity under section 1983 may not be extended to them. Again, Petitioner either misses or intentionally mischaracterizes the issue. This Court's prior decisions demonstrate that the question is not whether guardians ad litem and court-appointed forensic psychiatrists were around in 1871, but whether there is a functional equivalent that enjoyed common law immunity.

Petitioner argues that before extending absolute immunity to Respondents, the courts below should have considered both "the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*,

whether they dealt with the judge in his judicial capacity." *Stump v. Sparkman,* 435 U.S. 349, 362 (1978). Petitioner's argument is that Respondents were not performing a judicial function and that, therefore, absolute immunity should not be extended to them.

However, in *Stump,* this Court reversed the holding of the Court of Appeals. The lower appellate court there had found that a judge's alleged behavior was so extreme as to be outside his judicial role. In reversing, this Court wrote:

> Here, both factors indicate that Judge Stump's approval of the sterilization petition was a judicial act. State judges with general jurisdiction not infrequently are called upon in their official capacity to approve petitions relating to the affairs of minors, as for example, a petition to settle a minor's claim. Furthermore, as even respondents have admitted, at the time he approved the petition presented to him by Mrs. McFarlin, Judge Stump was "acting as a county circuit court judge." See *supra*, at 1106. We may infer from the record that it was only because Judge Stump served in that position that Mrs. McFarlin, on the advice of counsel, submitted the petition to him for his approval. Because Judge Stump performed the type of act normally performed only by judges and because he did so in his capacity as a Circuit Court Judge, we find no merit to respondents' argument that the informality with which he proceeded rendered his action

> nonjudicial and deprived him of his absolute immunity.

Stump, 435 U.S. at 362-63.

In the instant matter, both Respondents were appointed as a matter of routine to aid the county circuit court in the disposition of matter involving minors. The Illinois Marriage and Dissolution of Marriage Act provides that "[t]he court shall determine custody in accordance with the best interest of the child." 750 ILCS 5/602. In aid of this fundamental determination, "the court may order an evaluation concerning the best interest of the child as it relates to custody, visitation, or removal." 750 ILCS 5/604.5. "In contested custody proceedings, and in other custody proceedings if a parent or the child's custodian so requests, the court may order an investigation and report concerning custodial arrangements for the child." 750 ILCS 5/605. "The court shall, at the court's discretion or upon the request of any party entitled to petition for custody of the child, appoint a guardian ad litem to represent the best interest of the child for the duration of the custody proceeding . . . " 750 ILCS 5/601. Further, the Illinois Supreme Court Rules specifically address the conduct of attorneys and others appointed by the court or retained by the parties in custody proceedings, require strict adherence to ethical guidelines. Ill. S. Ct. R. 907. Those individuals serving the court must "make appropriate recommendations to the parties, and seek appropriate relief in court, if required, in order to serve the best interest of the child." Ill. S. Ct. R. 907.

There can be no dispute that every act of Respondents alleged by Petitioner, even conspiracy, has been alleged to have occurred within the scope of their appointments as judicial officers and that each and every act alleged was judicial in nature. The very authority relied on by Petitioner for her contention that Respondents did not perform judicial functions belies her argument. Just as in *Stump, supra,* even if the allegations of Petitioner's complaint are accepted as true, everything done by Respondents was a function normally performed by a judge and the parties knew that the appointment of a guardian ad litem and a custodial evaluator were both to be expected and within the judicial role under Illinois law.

Again, this Court has used a functional analysis to court-appointed individuals acting in a quasi-judicial role, not based on whether the specific role existed in 1871, but on whether the exercise of the judicial function requires discretion. *See Antoine v. Byers & Anderson, Inc.,* 508 U.S. 429, 436-37 (1993). The appropriate analysis, employed correctly by the courts below, is whether there is:

> (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safe-guards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal.

Cleavinger v. Saxner, 474 U.S. 193, 201 (1985).

All of the factors necessary for extending absolute immunity to Respondents in this case were addressed by the courts below and found to weigh in favor of immunity. "When judicial immunity is extended to officials other than judges, it is because their judgments are 'functionally comparable' to those of judges – that is, because they, too, 'exercise a discretionary judgment' as a part of their function." *Snyder v. Nolan,* 380 F.3d 279, 286 (7th Cir. 2004) (citations omitted). Respondents "are arms of the court much like special masters, and deserve protection from harassment by litigants just as judges do." *Cooney,* 583 F.3d at 970.

II. There Is No Conflict Between Circuits of the Court of Appeals or With Prior Decisions of This Court.

Petitioner mistakenly posits that there are conflicts between circuits of the Court of Appeals regarding whether evaluators, such as Respondent Rossiter, should be granted qualified or absolute immunity from liability under section 1983. As with the balance of her petition, she misreads this Court's and the lower courts' decisions.

In the case of Respondent Rossiter, Petitioner produces a single opinion from the U.S. Court of Appeals from the Ninth Circuit in support of her contention that the circuits are at odds. *See Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003). As she notes in her petition, the Ninth Circuit has held that

court-appointed psychiatrists/evaluators are entitled to absolute immunity in their quasi-judicial roles. *See Burkes v. Callion*, 433 F.2d 318, 319 (9th Cir. 1970). According to Petitioner, however, the later decision in *Gammie*, calls *Burkes* into question.

Quite the contrary, the appellate court in *Gammie*, found that in order to address whether social workers were entitled to absolute immunity from liability, it first had to "look to functions that enjoyed absolute immunity at common law in 1871." *Gammie,* 335 F.3d at 897. The court discussed both quasi-judicial absolute immunity and quasi-prosecutorial immunity under the functional analysis. *Id.* at 898. In *Gammie,* the lower appellate court found deferral on the issue of whether defendants were entitled to qualified or absolute immunity to be proper because the plaintiff's complaint contained no allegations of the performance of either quasi-prosecutorial or quasi-judicial functions. *Id.* at 898-99. The court specifically noted that if the functions of the defendants had been alleged, or were ultimately found, to be either "prosecutorial" or "judicial" in function, they "would have enjoyed common-law absolute immunity." *Id.* at 898.

More surprising is Petitioner's attempt to create conflict through reliance on *Kurzawa v. Mueller*, 732 F.2d 1456 (6th Cir. 1984). There, the Court of Appeals for the Sixth Circuit found a court-appointed psychiatrist to be entitled to absolute immunity from liability pursuant to section 1983 using "the analysis employed by the Supreme Court in *Briscoe, Butz,* and *Imbler*." *Id.* at 1458. In *Kurzawa*, the court found the function

performed by the psychiatrist in providing information "to the courts to determine what environment best serves the interests of the child" to be analogous to a witness and, therefore, entitled to absolute judicial immunity. *Id.* Yet, Petitioner plays semantics to argue that this is somehow in conflict with the holding of the appellate court below which used the phrase "arms of the court" rather than, "[t]his function of providing information is analogous to that of a witness . . . " *Id.*

Finally, Petitioner asserts that her petition is analogous to the situation presented in the matter of *Pottawattamie County, Iowa v. McGhee*, 129 U.S. 2002 (08-1065, 2009), in which this Court recently granted a *writ of certiorari* from the Court of Appeals for the Eighth Circuit. *See McGhee v. Pottawattamie County, Iowa*, 547 F.3d 922 (8th Cir. 2008). Petitioner characterizes this Court's leave to appeal in that case as being motivated by an interest in resolving a split between the circuits on the issue of absolute prosecutorial immunity in the context of the violation of civil rights through the provision of false testimony in furtherance of a criminal prosecution.

The question presented to this Court in *Pottawattamie* is:

> Whether a prosecutor may be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly (1) violated a criminal defendant's "substantive due process" rights

> by procuring false testimony *during the criminal investigation*, and then (2) introduced that same testimony against the criminal defendant at trial.

(No. 08-1065, Docket) (emphasis added).

In *Pottawattamie*, the circuit court of appeals affirmed the decision of the district court finding that a prosecutor, who had acted as an advocate by having someone arrested *before* probable cause had been established, would not be entitled to absolute prosecutorial immunity. *Pottawattamie,* 547 F.3d at 929 (citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993)). Thus, it is apparent that to the extent there was a question presented to this Court in that case, it had to do with whether pre-arrest actions of a prosecutor are within the ambit of the prosecutorial role granted absolute immunity at common law.

There is no dispute in this case that no matter how egregious the behavior of Respondents is alleged to be, none of that behavior is alleged to have occurred outside of the scope of their court-appointed roles. *See Stump, supra.* Most importantly, the fact that this Court granted the petition for *writ of certiorari* in the *Pottawattamie* matter is of no consequence because that appeal has been dismissed by this Court pursuant to Rule 46 of the Supreme Court Rules. (No. 08-1065). The parties to this case, including Petitioner, are without knowledge of the reasons for dismissal and, therefore, without basis for arguing that

the decision to dismiss should bear some precedential weight.

CONCLUSION

As a result, the petition for *writ of certiorari* from the U.S. Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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